IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

Crl.Rev.Pet.No. 2747 of 2006

CRA.144/2005 of ADDL. SESSIONS COURT (ADHOC)-II, ALAPPUZHA
SC.539/2001 of ASSISTANT SESSIONS COURT, CHERTHALA

.....

REVN. PETITIONER: APPELLANT/ACCUSED:

MOHANAN, S/O.KOCHU NARAYANAN,
VELIYIL HOUSE, CHERTHALA SOUTH MURI,
CHERTHALA VILLAGE.

BY ADV. SRI.K.S.HARIHARAPUTHRAN
SRI.GEORGE MATHEW

RESPONDENT/RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REP. BY EXCISE INSPECTOR,
EXCISE RANGE, CHERTHALA, THROUGH PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SHRI K.C.SANTHOSHKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

J.B. KOSHY & K.PADMANABHAN NAIR, JJ.

Crl. R.P.No. 2747 of 2006

Dated this the 12th day of December, 2006

Order

Koshy, J.

What exactly is the offence punishable under section 55 of the Kerala Abkari Act, Act 1 of 1077 (hereinafter referred to as 'the Act') is the question referred for decision of this Court. Main dispute is regarding the scope of sub-section (a) of section 55. According to the learned single Judge who referred the matter, there is a conflict between the decisions of the single Judges in Karthikeyan v. State of Kerala (2000 (3) KLT 639), Balan v. State of Kerala (2002 (3) KLT 161), George Issac v. State of Kerala (2004 (1) KLT 752) and Sabu v. State of Kerala (2003 (2) KLT 173). During hearing, another decision of the Division Bench in Surendran v. Excise Inspector (2004 (1) KLT 404) is also referred to. Reference was also made to the following decisions: Mariamma and another v. State of Kerala and others (1998 (1) KLT 286), Rajeevan v. Excise Inspector (1995 (1) KLT 38) and Purushan v. State of Kerala (2002 (2) KLT 661).

2. Before going to the issue in the matter, we may refer to the relevant statutory provisions regarding offence and proved under the Act. Section 55 of the Act is as follows:

> "55. For illegal import, etc.:- Whoever in contravention of this Act or of any rule or order made under this Act
>
> (a) imports, exports, transports, transits or possesses liquor or any intoxicating drug; or
>
> (b) manufactures liquor or any intoxicating drug;
>
> (c) xx xx xx
>
> (d) taps or causes to be tapped any toddy-producing tree; or
>
> (e) draws or causes to be drawn toddy from any tree; or
>
> (f) constructs or works any distillery, brewery, winery or other manufactory in which liquor is manufactured; or
>
> (g) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug; or
>
> (h) bottles any liquor for purposes of sale; or

(i) sells or stores for sale liquor or any intoxicating drug;

shall be punishable

(1) for any offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh and

(2) for an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both.

Explanation:- For the purpose of this section and section 64-A, "intoxicating drug" means any intoxicating substance, other than a narcotic drug or psychotropic substance regulated by the Narcotic Drugs and Psychotropic Substances Act, 1985 (Central Act 61 of 1985), which the Government may by notification declare to be an intoxicating drug."

Section 58 of the Act is as follows:

"58. For possession of illicit liquor:- Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the

duty, tax or rental payable under this Act not to have been paid therefor, shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh."

3. Section 55B provides for penalty for rendering or attempting to render denatured spirit fit for human consumption. Section 56 provides for punishment for misconduct by licensees. Section 56 is as follows:

"56. For misconduct by licensee, etc:- Whoever, being the holder of a licence or permit granted under this Act or being in the employ of such holder and acting on his behalf -

(a) fails to produce such licence or permit on the demand of any Abkari Officer or of any other officer duly empowered to make such demand; or

(b) willfully does or omits to do anything in breach of any of the conditions of his licence or permit not otherwise provided for in this Act; or

(c) xx xx xx

(d) permits drunkenness, riot or gaming in any place in which any

> liquor or intoxicating drug is sold or manufactured; or
>
> (e) permits persons of notoriously bad character to meet or remain in any such place;
>
> shall, on conviction before a Magistrate, be punished for each such offence, with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both."

Section 56A provides punishment for allowing consumption of certain preparations in business premises for the manufacture and stocking of such preparations by the Chemists, druggists, dispensaries or vaidyasalas etc. containing liquor or intoxicating drug except for bona fide treatment. Section 57 imposes penalty for adulteration etc. by licensed vendors or manufacturers. Section 57A imposes very serious penalties which may extend to life imprisonment and heavy fine for adulteration of liquor or intoxicating drug with noxious substances. Section 63 provides punishment for other offences not specifically provided in other section. Section 63 of the Act reads as follows:

> "63. <u>For offences not otherwise provided for</u>:- Whoever is guilty of any act

> or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such wilful act or omission with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both."

4. In Karthikeyan v. State of Kerala (2000 (3) KLT 639) offences alleged against petitioners who were FL 3 licensees and barmen in a licensed hotel for selling liquor on a prohibited date under rule 28A of FL Rules and conditions of licence. Court only held that, prima facie, it appears that the petitioners have committed the offence punishable under section 55 (1) as well as 56 (b) of the Act. The question when the offence come squarely within section 56 (b) whether petitioner has committed offence under section 55 (a) was not considered in the above decision. Counsel for the petitioners in that case relying upon the decision in Mariamma and another v. State of Kerala and others (1998 (1) KLT 286) submitted that the offence, if any, alleged to have been committed by the petitioners will not attract the provisions of section 55 of the Act and if at all, the offence will

come within the ambit of section 56 (b) of the Act. In that judgment the matter which came up for consideration before this Court was whether the circulars issued by the Board of Revenue on 3.9.1996 and 10.9.1996 to the effect that when it is detected that liquor in possession or in the course of sale by a licensee is found to be diluted, crime should be charged under section 55 of the Abkari Act. On the submission made by the Advocate General on the basis of the earlier judgments passed by this Court that the offence will come only under section 56 (b) of the Abkari Act, the learned single Judge found that the offence will come only within the ambit of section 56 (b) of the Abkari Act. In Karthikeyan's case question when the offence is squarely coming under section 56 (b), whether he can be charged for offence under section 55 (1) for alleged violation of section 55 (a) was not specifically considered. Court only held that, on the facts of that case, the complaint cannot be quashed at the inception.

5. In Balan v. State of Kerala (2002 (3) KLT 161), an ex-serviceman was charge-sheeted for possessing more than 1.5 litres of liquor allowed on the basis of notification existed at that time, but, court only held in the above case that possessing more than maximum quantity of Indian made foreign liquor in violation of the notification is an offence and complaint cannot be quashed at the initial stage. Whether section 55 or 58 or 63 is attracted or not was not considered threadbare in the above decision. We also note that, later, quantity of liquor one can possess was increased and by notification G.O. (P) No.173/2002/ED dated 30.11.2003 Government has amended the earlier notification and allowed ex-servicemen to get the quota allotted to them subject to production of identity cards and bills or certificates regarding purchase of the same. Therefore, the above decision has also no application on the facts of this case to consider the question referred.

6. In Sabu v. State of Kerala (2003 (2) KLT 173) one of us, J.B.Koshy, J., held that if the liquor is purchased from the Kerala State Beverages Corporation for own consumption, there is no question of illegal import

or transporting of illicit liquor within the contemplation of section 55 (a). If the offence is only possession of excess quantity of liquor permissible under law, though purchased legally from Kerala State Beverages Corporation, it may, at the maximum, attract section 63 of the Act. In George Issac v. State of Kerala (2004 (1) KLT 752), a single Judge of this Court held that if the licence holder sells the liquor on a prohibited day, it will become an offence under section 55 (a) and not under section 56 (b). In the above decision, the decision of Mariamma's case and Sabu's case (supra) were sought to be distinguished stating that those decisions have to be understood to have held only that offence connected with import, export, transport and transit of illicit liquor will be an offence under section 55 (a) of the Act.

7. A Division Bench in Surendran v. Excise Inspector (2004 (1) KLT 404) held that when a person is in possession of liquor while illegally importing or transporting imported liquor, it will be covered under section 55 (a) of the Act and mere possession of illicit liquor or liquor will not come under section 55 (a). At paragraph 10 of the Division Bench judgment, it was stated as follows:

> "10. The matter can be looked at from another angle also. Keeping in view the slight similarity in language it is permissible to refer to the heading of the provision. S. 55 is labelled as - "for illegal imports etc." Thus, the Legislature is providing for penalty in a case where a person illegally imports alcohol. S.58 makes the "possession of illicit liquor" culpable. Resultantly, it is clear that when a person is in possession of liquor while illegally importing it the case would be covered under S.55(a). In a case where the possession is of illicit liquor the case would fall within S.58. In other words, we hold that the view as expressed in Rajeevan v. Excise Inspector and Purushan v. State of Kerala is correct."

Therefore, Division Bench upheld the ratio of the decision reported in Rajeevan v. Excise Inspector (1995 (1) KLT 38) and Purushan v. State of Kerala (2002 (2) KLT 661) and did not accept the view taken in Meenakshi v. Excise Inspector (1995 (1) KLT 738).

8. Section 55 is a penal provision. It is settled proposition that statute imposing criminal or other penalty shall normally be construed narrowly in favour of the person proceeded against especially when

the punishment provided is monstrous. This rule has been stated by **Mahajan, C.J.** as follows:

> "If two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature." (Tolaram Relumal and another v. State of Bombay - AIR 1954 SC 496).

On the principle that penal provisions are strictly construed it was held by the Apex Court that "contravention of conditions of a licence granted under a Statutory Order cannot be construed as contravention of the Order resulting in penal consequences, unless the order itself provides that the licensee shall comply with all the conditions of the licence". (East India Commercial Co. Ltd., Calcutta and another v. Collector of Customs - AIR 1962 SC 1893) (See also: W.H.King v. Republic of India and another - AIR 1952 SC 156 at page 158). Applying the above principle of strict interpretation, penal provisions for contravention of

rules made under an Act cannot be construed and applied for contravention of the Act as held by the Supreme Court in Becker Gry and Co. Ltd. and others v. Union of India and another ((1970) 1 SCC 352). (See also: Tolaram Relumal and another v. State of Bombay (AIR 1954 SC 496).

9. The minimum fine amount under section 55 is Rupees Five lakhs. Punishment itself suggests section 55 is intended for very serious offences. Object of the Act which is to be interpreted also shall be looked into. If a person sells or possesses (section 57A) illicit or adulterated liquor (which may lead to liquor tragedies) or one manufactures (section 55 (b)) or imports or exports liquor (section 55 (a)) without licence or sells liquor (section 55 (i))illegally without licence causing heavy financial burden on the State by avoidance of tax etc., offence is very serious and punishment of a minimum fine of Rupees One lakh may be justifiable. The words 'transports, transits or possesses' were subsequently added to the words 'imports, exports'. The words 'transports, transits or possesses' coming after the words 'imports, exports' show that subsequent words should be read in ejusdem generis to the words 'imports or exports'. The literal meaning of 'Ejusdem Generis' is

'of the same class or kind'. (See: **Trayner's Latin Maxims** - Seventh Edition, page 181). Rule of 'Ejusdem Generis' is explained and accepted by the Hon'ble Apex Court in Kavalappara Kottarathil Kochuni @ Moopil Nayar v. The States of Madras and Kerala and others (AIR 1960 SC 1080), State of Karnataka and others v. Kempaiah (AIR 1998 SC 3047) etc. to the effect that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule applies to the following circumstances:

1. The statute contains an enumeration of specific words;
2. The subjects of enumeration constitute a class or category;
3. That class or category is not exhausted by the enumeration;
4. The general terms follow the enumeration; and
5. There is no indication of a different legislative intent.

(See the decision of the Apex Court in Tribhuvan Prakash Nayyar v. Union of India - AIR 1970 SC 540 at 545). In **'Maxwell on The Interpretation of Statutes'**, Twelfth

Edition, page 297, quoting R. v. Cleworth ((1864) 4 B. & S. 927), it is stated as follows:

> "..... the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words. For 'according to a well established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the Legislature."

In Ashbury Railway Carriage & Iron Co. v. Riche ((1875) L.R. 7 H.L. 653), the House of Lords had to consider the statement in a Memorandum of Association that one of the objects of the company was "to carry on the business of mechanical engineers and general contractors." **Lord Cairns L.C.** said that the generality of the expression 'general contractors' was limited by the previous words 'mechanical engineers', and that it ought to be confined to the making of contracts connected with that business. The words in a statutory provision is to be construed as

a whole. If section 55 (a) is applicable to all kinds of transport or possession of liquor (without licence), separate provisions need not have been made for transport or possession of liquor. In this connection, we are also of the view that heading of section 55 gives an indication of the legislative intent as noticed in paragraph 3 of the judgment in Sabu v. State of Kerala (2003 (2) KLT 173). In a case where licensee violates the conditions of licence or commits misconduct by selling the liquor in a holiday, it will come only under section 56 as specific provision for misconduct of licence is mentioned under section 56 and the above offence will not come under section 55 of the Act. Possession of liquor knowingly that it was illegally imported or knowing that it was not duty paid or illegally transported or manufactured, the offence will come under section 58, but, knowledge that it was illegally imported or transported or manufactured or tax was not paid on that liquor is a condition under section 58. Therefore, mere possession even with knowledge that possession was illegal will not attract a higher penalty.

10. Now, the matter is settled by the Division Bench decision of this Court in Surendran v. Excise Inspector (2004 (1) KLT 404) wherein it was held that section 55 (a) of the Act deals with only illegal import, export or transport, transit etc. on such import or export. It was made clear that section 55 (a) is applicable only when persons illegally imports or transport liquor or in possession of liquor while illegally importing. The observations made in Karthikeyan v. State of Kerala (2000 (3) KLT 639), Balan v. State of Kerala (2002 (3) KLT 161) and George Issac v. State of Kerala (2004 (1) KLT 752) contrary to the decision made in Surendran's case (supra) are no more good law. It is true that if a licensee illegally manufacture liquor or intoxicating drugs, apart from section 56, he may be guilty under section 55 (b). Further, if he makes of sells denatured spirit fit for human consumption or adulterate liquor, he will be punishable under the other sections also like sections 57, 57A etc. But, section 55 (a) will not be attracted merely because he sells the liquor on a prohibited day, but, punishment can be imposed under section 56. As far

as section 55 is concerned, sub-clause (a) deals with illegal imports and exports of liquor or intoxicating drugs or transports or possesses such liquor covered under import or export. Sub-clause (b) deals with manufacture of the same. Sub-clauses (d) and (e) deal with illegal toddy tapping or drawing of toddy from trees. Section 55 (f) deals with engagement in construction or works relating to illegal distillery, brewery etc. and clause (g) deals with possession of utensils or implements or apparatus for manufacturing illegal liquor. Section 55 (h) deals with bottling of liquor for the purposes of sale without licence and clause (i) deals with illegally storing of liquor for selling the same. Other abkari offences are specifically dealt with in various other provisions.

11. Now, we will come to the offence committed by the petitioner herein. Petitioner was caught while transporting toddy in a bicycle. He is a tapper by profession. He tapped the toddy from a licensed coconut tree. When a permanent tapper having licence to tap and transport was laid up, he was entrusted with that duty of tapping and transporting toddy to the licensed shop. The fact that while transporting the above toddy in bicycle,

he was caught is proved by the evidence of PWs 1 to 5. It is true that as per the provisions existing at that time, no person or persons shall possess liquor exceeding 2.5 litres except under permit or licence. The toddy in his possession was not measured. DW1 is a permanent tapper. He deposed that he was not able to tap toddy on that day due to illness. Hence, he authorised the accused to tap toddy and take it to licensed shop on his behalf. While accused was taking toddy to the concerned licensed shop on behalf of DW1, he was stopped by the excise guard. It is the case of the accused that he was charge-sheeted because bribe demanded was not given. We believe the evidence of DW1. In any event, the case of the accused given in the statement under section 313 as a possible one and it cannot be stated that he was illegally importing or exporting toddy. However, the fact that when DW1 was not well on one day, a separate authorisation in his favour was taken is proved. Hence, it is not an offence under section 55 (a). He is a poor casual substitute tapper in an attached licensed toddy shop who tapped licensed trees. We also note that he was not charge-sheeted for offence under section 55 (d) or (e). In the above circumstances, we are of the view that

instead of section 55 (a) read with section 55 (1) maximum punishment that can be imposed is under section 63. Hence, conviction and sentence under section 55 (a) is set aside and appellant is convicted under section 63 and sentenced to pay a fine of Rs.5,000/-. Criminal revision petition is partly allowed.

J.B.KOSHY
JUDGE

K.PADMANABHAN NAIR
JUDGE

vaa

J.B. KOSHY AND
K.PADMANABHAN NAIR, JJ.

CRL.R.P. No.2747/2006

ORDER

Dated:12th December, 2006